

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

BAYSHORE AMBULANCE COMPANY

and

Case 20-CA-35598

NATIONAL EMERGENCY MEDICAL
SERVICES ASSOCIATION

Richard J. McPalmer, Esq. and
Matthew A. Jackson, Esq., for the General Counsel.
Kerry E. Kennedy, Esq. for the Respondent.
Dary Sardad, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial in San Francisco, California, on February 22, and May 24–25, 2012. On May 31, 2011, National Emergency Medical Services Association, (the Union) filed the charge in Case 20–CA–35598 alleging that Bayshore Ambulance Company (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. § 151 et seq. the Act). The Union filed the amended charge on September 15, 2011 and a second amended charge on October 28, 2011. A third amended charge was filed on December 28, 2011. On this same date, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(1) and (3) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

On January 31, 2012 the Regional Director issued a compliance specification and order consolidating compliance specification with the complaint. On February 17, 2012, the Regional Director issued an amended compliance specification. Respondent filed an answer to the amended compliance specification on February 21, 2012.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from

my observation of the demeanor of the witnesses¹ and having considered the posthearing briefs of the parties, I make the following.

FINDINGS OF FACT AND CONCLUSIONS

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I. Jurisdiction

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Respondent, a California corporation with an office and place of business in Foster City, California, has been engaged in the business of providing ambulance and wheelchair van transportation services. During the 12 months prior to issuance of the complaint, Respondent derived gross revenues in excess of \$500,000. During the same time period, Respondent purchased and received goods or services valued in excess of \$5000 which originated from outside the State of California. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

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A. Issues

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The complaint alleges that Respondent unlawfully discharged employee Josh Petrick in order to discourage union membership and activities in violation of Section 8(a)(3) and (1) of the Act. Respondent avers that Petrick was discharged for a violation of company rules and not for any reasons prohibited under the Act.

B. Background

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Respondent is an ambulance service company that provides routine nonemergency medical transportation. The majority of calls handled by Respondent are dubbed basic life support (BLS), meaning a call not requiring life saving intervention. Such calls are categorized as codes 1, 2 or 3 with 1 being the lowest priority and 3 being the highest. For Codes 1 and 2, the responding crew may not use lights or sirens and must adhere to traffic lights. For code 3 calls, lights and sirens are used and the crews may drive 10 miles per hour above the speed limit, and may proceed with caution against traffic lights.

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At times relevant herein, Respondent employed approximately 30-45 emergency medical technicians (EMTs) and about five dispatchers. The EMTs respond to calls requesting patient transport, administer patient care and transport patients. The EMTs work in crews of two. A two person crew is assigned a Nextel phone device and a pager, which are used for communicating with Respondent's dispatcher.

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¹ The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

EMT Josh Petrick worked two 24-hour shifts a week. Employees who worked 24-hour shifts were permitted to sleep during breaks but also received calls when they were asleep. A crew is required to respond to a call within 1 minute by day and 2 minutes by night. Crews are expected to respond within two minutes and crews dispatched by night should be en route within r minutes.

C. Facts

1. The Discharge of Josh Petrick

On December 17, 2010, Respondent announced that it was implementing significant changes to EMT shift schedules. Respondent planned to reduce its 12-hour shifts to 10 or 8 hours and planned to eliminate the 24-hour shifts, replacing them with 12-hour shifts. Employees were not pleased with these changes as they required the employees to work more days in order to obtain the same number of hours. Further these changes increased commuting costs and reduced the employees' ability to devote time to other activities. To employee Josh Petrick, these changes meant more workdays and less pay, as overtime hours would decrease.

Immediately following Respondent's announcement of the shift schedule changes, Petrick began speaking with his coworkers about the proposed changes. Petrick spoke with employee Pedro Contreras, a part-time EMT and former supervisor. After discussing the matter with other EMTs, on December 20, 2010, Contreras sent an email to EMT Supervisor Gustavo Ramos seeking a compromise on Respondent's planned shift schedule changes. Although Respondent initially agreed to postpone implementation of the changes, Respondent did not agree to the compromises suggested by Contreras and did not discuss the matter further with employees.

When it became clear that Respondent would not compromise regarding the schedule change, Contreras and Petrick decided to seek union representation. Petrick researched different unions and found the National Medical Services Association (the Union). In December Petrick contacted Union Representative Dary Sardad to discuss union organizing.

On January 22, 2011, the Union held a meeting with approximately 11 of Respondent's employees including Petrick and Contreras. The employees decided that Contreras would be the primary leader with Petrick second behind him. Petrick was assigned two employees to collect union authorization cards from. Petrick obtained a majority of the cards obtained by others and passed them on to Contreras. Respondent's supervisors Gustavo Ramos and Anthony Fletcher were aware of Petrick's union activity.

The Union organizing led to the filing of a representation case petition in Case 20-RC-18331 on January 28, 2011. Respondent admits receiving the petition on January 31. By February 1, Respondent's vice president, David Bockholt, contacted a labor relations consultant. Within 2 or 3 days David Bockholt and Respondent's supervisors met with the consultants concerning the union organizing and the petition.

Petrick was working a 24-hour shift which began on the morning of January 13, 2011, and ended on the morning of January 14. His partner for the shift was EMT Gavin McCarthy. At approximately 2:14 a.m. dispatcher Sophia Mousavi received a call from Peninsula hospital in Burlingame. The purpose of the call was to pick up a patient at Peninsula Hospital and transport him to Mills Hospital in San Mateo. Mousavi informed the requester from Peninsula that she would have the crew there in 15 or 20 minutes. The call was assigned a code1 status. The call was assigned to the crew of Petrick and McCarthy.

At the time of the dispatch both McCarthy and Petrick were asleep. McCarthy received the page and went to wake up Petrick. McCarthy got ready and then noticed that Petrick was still asleep. He again tried to wake up Petrick.

McCarthy used the radio to acknowledge the call. From the ambulance McCarthy saw Petrick walking to the restroom. After 4 or 5 minutes, Petrick got into the ambulance. McCarthy remarked that Petrick had taken his time. It took the crew approximately 30 minutes to arrive at the Peninsula Hospital. This is a 15-minute trip at that time of day.

According to McCarthy, Supervisor Gustavo Ramos questioned him on January 14 about the late response to the call to Peninsula Hospital. McCarthy told Ramos that the crew had been late to the call, that dispatcher Sophia Mousavi was angry and that Petrick would not get up. Ramos stated that he would speak to Petrick and supervisor Anthony Fletcher.

A few days after McCarthy spoke with Ramos, he spoke with supervisor Anthony Fletcher. McCarthy told Fletcher that the crew was late to the call, Mousavi was angry and that Petrick would not get up. Either Ramos or Fletcher made an entry into Respondent's computer system on January 19, indicating that Petrick would be written up for this incident.

According to David Bockholt, he became aware of the January 14 incident on January 19. Thereafter, Fletcher performed an investigation, speaking with McCarthy, Mousavi, and another crew that was present that evening. On February 4, Fletcher prepared a first and last written warning for Petrick relating to the January 14 delayed call incident. On February 7, Bockholt wrote on the warning, "After investigating there was exact incident on February 2010, was spoken to by supervisor. This is completely unacceptable Move to terminate." Also on February 7, Bockholt made a computer entry, "completed investigation with dispatch supervisor and Fletcher regarding Josh and delay to response call on 1/14/2011 NO EXCUSE."

On February 8, 2011, Petrick was called to a meeting with Bockholt and Fletcher. Fletcher first mentioned that Petrick had remained on the premises after his shift. Petrick explained that he had done so to avoid heavy traffic. Petrick was given a warning for this violation of company rules. The meeting then turned to the delayed response of January 14. Patrick replied that he was probably sleeping and asked what the supervisors were doing at that time. Bockholt stated that there was a delayed call on the morning of January 14. Petrick stated that this was the first that he had heard of it and that he didn't know anything about it. The supervisors stated that they spoke to McCarthy and that McCarthy had stated that it took Petrick about 20 minutes to get out of bed. Petrick asked to talk to McCarthy. Bockholt stated they had concluded their investigation and asked Petrick to resign. Petrick said he would not resign. Bockholt said that if Petrick did not resign he would be terminated. Petrick stated that he had been a good employee.

Bockholt then issued a termination notice and a final paycheck to Petrick. The termination notice and paycheck had been prepared in advance of the meeting. Bockholt stated that he had not yet decided to terminate Petrick but had prepared the paperwork just in case. Bockholt and Fletcher both testified that it was Petrick's nonchalant approach in the meeting that caused his termination.²

² I do not credit the testimony that Petrick's approach at the meeting caused his discharge. Rather, I find, based on Bockholt's written remarks of February 7 that Bockholt and, thus Respondent, decided to terminate Petrick on February 7, prior to the meeting with Petrick.

Petrick received a favorable employee evaluation (all excellents) in June 2009, despite a computer notation that he had been late responding to a call. The General Counsel produced evidence that that between January 2009 and February 20, 2012 there were 1,628 instances in which the time between dispatch and the time the ambulance went en route exceeded 5 minutes. Bockholt testified that between 60%-70 percent of these instances were explained by the computer system not working. Allowing for 70 percent, it remains 488 delays unexplained by computer error. Bockholt testified that certain of these delays were caused by the fact that the crews were on other assignments at the time of the call. Respondent's computer system showed that of 27 delayed calls noted in its computer system only two calls resulted in discipline – the January 19, 2011 incident involving Petrick and a 1998 incident involving another employee.

Respondent's Solicitation Rule

Respondent's handbooks contain the following rule on solicitation:

In an effort to assure a more productive and harmonious work environment, persons employed by Bayshore Ambulance may not solicit or distribute literature in the workplace at any time for any purpose. Also, employees may not bring in an outside non-employee to solicit, sell or distribute any materials at any time. Bayshore Ambulance recognizes that you may have interests in events and organizations outside the workplace. However, you may not solicit or distribute literature concerning these activities during working time. (Working time does not include meal periods, work breaks, or any other periods in which employees are on duty.)

D. Analysis and Conclusions

In cases involving dual motivation, the Board employs the test set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that the General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line*, supra, 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 fn. 2 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services*, supra:

To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

If the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be

warranted. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).
 5 Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line*, *supra*, 251 NLRB at 1088 fn. 11.

The General Counsel has established that Petrick was engaged in union activities from late December 2010 until his discharge in February, 2011. Respondent's supervisors were well
 10 aware of his activities.

Upon receipt of the representation petition Respondent sent its employees a letter stating, "Please vote and mark your ballots for yourself by voting NO." The employee handbook stated "Bayshore Ambulance is a pro-people employer operated by non-union employees. It
 15 has always been, and we plan for the Company to remain this way."

The timing of the February 8 termination after receipt of the petition further adds to the prima facie case. The delayed call took place 3 weeks earlier. Respondent never spoke to Petrick about the delayed call prior to his termination. While, Respondent contends that the
 20 decision to terminate Petrick was not made until his interview with Fletcher and Bockholt, I find based on Bockholt's notations on the proposed warning form, that Bockholt had determined to discharge Petrick prior to the meeting on February 8.

I find disparate treatment of the incident at issue. There were hundreds of delayed calls
 25 which did not result in discipline. Petrick received a very favorable employee evaluation even after a similar incident.

The General Counsel has established both Petrick's union activities and the knowledge or constructive knowledge of those activities by Respondent. There is no doubt that Petrick was
 30 at fault for the delayed call for which he was terminated. The issue is whether the conduct was the reason for the discharge rather than his protected union activities.

I have considered the demeanor of the witnesses, the arguments of the parties on brief and the record as a whole on this critical issue. I find that the General Counsel has met his initial
 35 burden to show that antiunion sentiment was a "motivating factor" Petrick's discharge.

I find that based on the investigation of Fletcher, Petrick would have at most been issued a warning. I find based on the evidence of disparate treatment that Petrick would not
 40 have been discharged for this conduct. Accordingly, I find Respondent discharged Petrick in violation of Section 8(a)(3) of the Act.

Respondent's Solicitation Rule

While an employer has a right to impose some restrictions on employees' statutory right
 45 to engage in union solicitation and distribution, such restrictions must be clearly limited in scope so as not to interfere with employees' right to solicit their coworkers on their own time or to distribute literature on their own time in nonwork areas. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983).

Here, the rule bars solicitation "in the workplace at any time for any purpose." The rule
 50 is limited to working time but does not define workplace. Respondent's facilities include nonwork and/or mixed use areas such as sleeping quarters and a television room. The rule is

reasonably interpreted as precluding solicitations anywhere on Respondent's property. See, e.g., *Winkle Bus Co.*, , 347 NLRB 1203, 1215 (2006); *Laidlaw Transit Inc.*, 315 NLRB 79, 82 (1994). Accordingly, I find the rule interferes with, restrains and coerces employees' Section 7 rights in violation of Section 8(a)(1) of the Act.

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Backpay

As Respondent has not yet offered Petrick reinstatement, backpay is now calculated only through January 27, 2012, and the backpay period continues to run. For the period February 8 through 28, 2011, Petrick is entitled to backpay of \$2355.60 plus interest to be claculated. For the period of February 8 through February 28, 2011, Petrick's PTO benefit, not including interest is \$146.34. For the period February 8 through February 28, 2011, Respondent's matching contributions for Petrick's 401(k) retirement plan participation; not including interest is \$94.23. For the period March 1, 2011, through January 27, 2012 Petrick is entitled to backpay of \$27,162, plus interest to be calculated. For the period March 1, 2011, through January 27, 2012, Respondent's matching contribution for Petrick's 401(k) retirement plan participation, not including interest is \$486.48. Because the backpay period continues to run, the above amounts with -interest must be updated and recalculated to the present.

The General Counsel contends that the PTO benefit should be treated as separate and distinct from mere wages. The General Counsel contends that the paid time off benefit was not a mere dollar figure but actual time off Petrick would have accrued. Thus, the General Counsel contends that the PTO benefit should not be treated as gross backpay and not offset by interim earnings. I do not agree and find that the benefit can be calculated in monetary terms and treated as gross backpay. The amount can then be offset by interim earnings.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) by discharging Josh Petrick in order to discourage union activities.

4. Respondent violated Section 8(a)(1) by maintaining a solicitation rule which prohibited distribution even in nonworking areas of Respondent's premises.

5. Respondent is obligated to pay backpay in accordance with this Decision.

6. The above unfair labor practices above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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Respondent having discriminatorily discharged Josh Petrick, it must offer him reinstatement and make him whole for any loss of earnings as found in this decision, plus

interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

5 Respondent must also be required to expunge any and all references to its unlawful discharge of Petrick, from its files and notify Petrick in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against him in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

10 On the foregoing findings of fact and conclusions of law, and on the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended.³

ORDER

15 The Respondent, Bayshore Ambulance Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

20 (a) Discharging employees in order to discourage union activities and union membership.

(b) Maintaining a solicitation rule which prohibits distribution in nonworking areas of its premises.

25 (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

30 (a) Within 14 days from the date of this Order, offer Josh Petrick full reinstatement to his former job or, if that job no longer exists, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed but for his unlawful discharge.

35 (b) Make Petrick whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in this decision.

40 (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Petrick, and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

45 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such

³ All motions inconsistent with this recommended Order are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Foster City, California copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 8, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 30, 2012.

Jay R. Pollack
Administrative Law Judge

⁴ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400
San Francisco, California 94103-1735
Hours: 8:30 a.m. to 5 p.m.
415-356-5130.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139